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No. 07-1125

IN THE
Supreme Court of the United States

LISA RYAN FITZGERALD AND ROBERT FITZGERALD,

Petitioners,

v.

BARNSTABLE SCHOOL COMMITTEE AND RUSSELL DEVER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN COUNCIL ON EDUCATION, AND AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE* [1]

Founded in 1940, the National School Boards Association "NSBA" is a not-for-profit federation of state associations of school boards across the United States, including the Hawaii State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA also represents the nation's 95,000 school board members who, in turn, govern nearly 15,000 local school districts that serve more than 49.3 million public school students. NSBA's Beliefs and Policies (as amended March 28, 2008) encourage all public schools to adopt policies against the sexual harassment of students and employees, to provide clear complaint procedures, and to institute training programs for teachers, administrators, and students.

The American Council on Education ("ACE") was founded in 1918 and is the nation's unifying voice for higher education. Its more than 1,800 members include colleges and universities throughout the United States. ACE represents all sectors of American higher education and serves as a consensus leader on key issues affecting higher education. ACE participates as an *amicus curiae* only in cases that raise issues of widespread

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[1] The parties were notified more than ten days before the due date of the *amici's* intent to file. The parties have given written consent to the filing of this brief. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief.

importance to institutions of higher education. ACE, for example, has filed briefs *amicus curiae* in this Court in recent years in cases such as *Parents Involved in Community Schools v. Seattle School District No. 1,* 127 S.Ct. 2738 (2007), and *Gonzaga University v. Doe,* 536 U.S. 273 (2002).

The American Association of School Administrators ("AASA"), founded in 1865, is the professional association of over 14,000 local school system leaders across America. AASA's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children. AASA supports equal educational opportunity as a key factor in providing the highest quality public education for all children.

NSBA, ACE, AASA, and their members strongly support the policy of non-discrimination encompassed in Title IX. Amici believe that this brief will aid the Court in evaluating the effectiveness of Title IX in combating peer harassment and in considering the detrimental impact that reversal of the Court of Appeals' decision will have on the nation's schools and their administrators.

SUMMARY

As framed by the Petitioners, the question presented is a broad one: whether Congress intended Title IX of the Education Amendments of 1972, 20 U.S.C § 1681 to preclude any and all constitutional "gender discrimination" claims brought pursuant to 42 U.S.C. § 1983. The

Petitioners make this unnecessarily broad argument to distract the Court from the fact that the *particular* claim that they propose—peer harassment—finds no support in the historical record or in the Court's constitutional jurisprudence.

Although arguing that they merely seek to restore "preexisting" remedies, they press their Section 1983 argument without ever demonstrating to the Court that a *constitutionally-based* peer harassment claim actually was cognizable in 1972 when Title IX was enacted or that it is cognizable even today based on the facts alleged by the Petitioners. In fact, Section 1983 provides no remedy in Petitioners' case—nor should it. While the Petitioners' allegations of abuse against their young daughter are serious and naturally and appropriately elicit sympathy and concern, it is undisputed that no school employee personally harassed the Petitioners' child. Allowing Petitioners to pursue claims under Section 1983 based on the particular facts of this case would require the Court to dismantle long-standing precedents that limit governmental liability for acts of discrimination caused by private third parties. Eliminating or diluting these precedents will seriously impact schools, colleges, and universities by exposing them to unprecedented constitutional liability based on their failure or inability to control the actions of private third parties. The financial and practical implications for schools are enormous.

The central theme of Petitioners' argument is that the Title IX cause of action is too limited and that students need Section 1983 because it will be

easier for them to prove certain types of harassment claims. In fact, the opposite is true: Title IX covers more types of harassment incidents, and it overall imposes fewer proof hurdles on students. Title IX actually goes farther than the Constitution by allowing students to sue their schools even when the discrimination is inflicted by private third parties such as other students. By contrast, claims based on third-party misconduct ordinarily are not actionable under either the Equal Protection Clause or Section 1983, both of which require proof of state action. Private conduct, however discriminatory or wrongful, is not actionable under the Equal Protection Clause, even if the state is aware of the discrimination.

Not only does Title IX permit students to sue their schools for discrimination caused by their classmates, students may prevail under Title IX even if there is no evidence of gender animus by school officials. This is a marked difference from claims brought directly under the Equal Protection Clause, which requires proof of invidious and purposeful discrimination by school officials. Title IX merely requires that the student show that the school's response to student-on-student harassment was "deliberately indifferent." Although the underlying acts of harassment must be motivated by gender, the Court has not required the student to prove that the school's deficient response was motivated by gender.

Another important difference between Title IX and Section 1983 is that Title IX does not require that the student prove that the district maintained a

custom, policy, or practice of discrimination—a mandatory requirement in Section 1983 actions against school districts. For this reason, Title IX actions tend to be more manageable and less costly than Section 1983 litigation. Discovery in a Title IX case focuses narrowly on a relatively straightforward question: whether a school administrator was deliberately indifferent to known acts of sexual harassment against the plaintiff. Discovery in a Section 1983 case is far more burdensome and costly because the plaintiff is required to prove that the harassment was the result of a *district-wide* custom, policy, or practice. Spared the burden of proving up the defendant's past practices and past incidents, Title IX plaintiffs may focus efficiently and solely on their own personal experiences at their own schools.

An additional reason that Section 1983 cases are more costly than Title IX cases is that Section 1983 cases often involve multiple defendants, namely various school administrators. Multi-party cases are by nature more costly because they tend to involve more issues and more lawyers. In a Section 1983 case, the costs are further increased because school officials who are sued in their individual capacities invariably will assert qualified immunity, a unique defense that shields public officials from liability unless they personally participated in, or were deliberately indifferent to, a violation of the plaintiff's clearly established constitutional rights. The immunity defense is so important that this Court has authorized public officials to file interlocutory appeals of pretrial lower court rulings denying immunity. Given the comparative complexity and expense associated with Section 1983

claims, and given that current Title IX law provides a comprehensive and efficient remedy against schools that are deliberately indifferent to incidents of student harassment, the Section 1983 remedy is simply unnecessary.

In addition to being financially costly for schools, expanding the sources of constitutional litigation against schools and their officials would further intrude into the management of the schools while providing little real practical benefit to students. Providing new avenues for lawsuits against schools will not make the task of addressing student misconduct any easier. Petitioners' argument, at its core, is a backdoor attempt at revisiting this Court's carefully considered Title IX decisions that have defined the circumstances in which schools may be sued for damages when students harm each other. The Court appropriately has recognized the special challenge that school administrators face when dealing with difficult, immature, or reckless students. The Court's historical reluctance to interfere with the administration of school discipline by local school authorities reflects not just federalism concerns but very real practical concerns that arise when school administrators are called upon to mediate disputes among students. The Court must avoid shrinking the already narrow path school officials must tread when deciding whether and when to discipline.

The student in this case ultimately did not prevail—*not* because of the failure of Title IX to prohibit sexual harassment of students—but because there was no evidence of "deliberate indifference" by

school officials. Proof of "deliberate indifference" is an essential element of a claim under both Title IX and 42 U.S.C. § 1983. Because the Petitioners chose not to challenge the "deliberate indifference" ruling with respect to their Title IX claim, they are precluded from re-litigating this issue under Section 1983. The Court should dismiss the writ outright or affirm the judgment on the ground that Section 1983 and the Equal Protection Clause simply do not reach the conduct alleged in this lawsuit.

ARGUMENT

I. Because of unique requirements that apply to Section 1983 equal protection claims but not to Title IX claims, Congress could not have reasonably viewed Section 1983 as providing a remedy for the conduct alleged in this case.

The court below held that, although the Petitioners' child alleged severe and pervasive harassment by a male student, the school district could not be held liable under Title IX because school officials were not "deliberately indifferent" to the harassment. *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 174 (1st Cir. 2007). The Petitioners argue that they should have the opportunity to litigate their peer harassment claim under the Equal Protection Clause pursuant to 42 U.S.C. § 1983, a federal statute that provides a damages remedy to individuals whose federal constitutional or statutory rights are violated by a person acting under color of

state law.[2] Despite the limited scope of the First Circuit's ruling, the Petitioners argue that students need Section 1983 to litigate "gender discrimination" claims that currently are "unremedied" under Title IX. The Petitioners broadly argue for the right to litigate "gender discrimination" claims under Section 1983 to distract the Court from the fact that Section 1983 is actually not an effective or appropriate remedy *in their own case*. As shown below, Section 1983 is not an effective remedy in a peer-to-peer harassment case when the case is based on the same facts as the student's unwinnable Title IX claim. Given the restrictions applicable to Section 1983 claims, Congress could not have reasonably understood Section 1983 as providing a preexisting remedy for the type of conduct alleged in this case.

The reason that Section 1983 is ineffective is that equal protection claims brought pursuant to Section 1983 are simply more difficult to prove than claims brought solely under Title IX. This is a function of two factors: the intent and state action requirements of the Equal Protection Clause and the separate statutory requirements of Section 1983.

First, equal protection claims, unlike Title IX claims, require proof of invidious and purposeful discrimination by state actors. *See U.S. v. Morrison*,

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[2] Section 1983 allows plaintiffs to sue any person who, under "color" of state law, subjects the plaintiff to a deprivation of his or her federally protected rights. 42 U.S.C. § 1983. The statute creates no substantive rights but is a method for vindicating federal rights "elsewhere conferred." *Baker v. McCollan*, 443 U.S. 137, 144 n. 3 (1979).

529 U.S. 598 (2000). Discriminatory purpose means more than awareness of consequences; it means "that the decisionmaker . . . elected or reaffirmed a course of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group." *Personnel Administrator v. Feeney,* 442 U.S. 256, 279 (1979). Consequently, a plaintiff claiming a violation of equal protection must do more than show knowledge of and a failure to respond to the plaintiff's predicament; the plaintiff must show that his or her gender influenced the official's response. The lower courts routinely reject equal-protection/harassment claims where the student has failed to present evidence showing that the school officials intended to discriminate against the student because of his or her gender.[3]

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[3] *See, e.g., Williams v. Board of Regents*, 477 F.3d 1282, 1301 (11th Cir. 2007) (allowing Title IX claim to proceed but affirming dismissal of equal protection claim; university's athletic recruiting practices may have led to assault of female student, but the motivation for those practices was to win games and did not violate equal protection); *Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir. 2006) (student who was raped by another student failed to establish equal protection violation by school officials); *Henderson v. Walled Lake Consol. Schs.*, 469 F.3d 479, 492 (6th Cir. 2006) (rejecting student's equal protection claim because of student's failure to show that district officials treated her differently than male students); *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238 (10th Cir. 1999) (although the student stated a Title IX claim, she had not, "even [under] the most liberal construction" of her pleading, stated facts showing that the school district could be held liable for a violation of equal protection); *B.T. v. Davis*, 557 F.Supp.2d 1262 (D.N.M. 2007) (rejecting equal protection claim against school superintendent because of the absence of discriminatory intent; there was no evidence that the defendants "classified

In the Title IX context, by contrast, while the Title IX claimant must show "intentional discrimination,"[4] it is a less stringent requirement. Under *Davis v. Monroe County Board of Education,* 526 U.S. 629 (1999), the Title IX claimant merely has to show that school officials were "deliberately indifferent" to acts of sexual harassment. *Id.* at 648. While the offender's *underlying* acts of harassment must be gender-oriented to state a claim, *id.* at 651, the claimant need not prove that the school officials themselves were motivated by gender animus.[5] Especially in its practical application, the *Davis* standard is less demanding than the proof of intent required to establish an equal protection violation.[6] Consequently, Title IX plaintiffs have been able to

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student by gender or that they declined to investigate allegations of abuse against male students"); *Morlock v. West Cent. Educ. Dist.*, 46 F.Supp.2d 892, 918 (D. Minn. 1999) (stating that the Fourteenth Amendment "does not require the government to prevent private actors from discriminating"); *Doe v. Sch. Admin. Dist. No. 19*, 66 F.Supp.2d 57, 65 (D. Me. 1999) (allowing Title IX claim to proceed but rejecting equal protection claim because there was no evidence that district's "inept handling" of the matter was based on the gender of the students).

[4] *Franklin v. Gwinnett County Pub. Sch.,* 503 U.S. 60, 76 (1992).

[5] *See, e.g., Williams*, 477 F.3d at 1295 (plaintiff must "prove that the deliberate indifference occurred in response to [the] discrimination she faced").

[6] *See* D. Cohen, "Title IX: Beyond Equal Protection," HARVARD J. LAW & GENDER at 252 (Summer 2005). One appellate court observed that it "seems to us that many types of conduct that would be actionable sexual harassment" under Title IX "would not be *constitutional* torts under conventional equal protection or substantive due process analysis." *Cox v. Sugg*, 484 F.3d 1062 (8th Cir. 2007) (emphasis in original).

obtain relief for incidents that otherwise would not be actionable. *See, e.g., Vance v. Spencer County Pub. Sch. Dist.,* 231 F.3d 253 (6th Cir. 2006) (affirming verdict in favor of student because school's response to harassment was "clearly unreasonable"); *Doe v. East Haven Bd. of Educ.*, 200 Fed. Appx. 46, 2006 WL 2918949 (2d Cir. 2006) (unpublished) (affirming $100,000 judgment because district's response was "clearly unreasonable"); *see also Simpson v. Univ. of Colorado at Boulder*, 500 F.3d 1170 (10th Cir. 2007) (reversing summary judgment for university and allowing Title IX claim to proceed because there was a factual dispute whether the university was deliberately indifferent in maintaining recruiting practices that allegedly led to the rape of female students by male athletes). Precisely because of this less exacting intent element, it is relatively rare to find an equal protection claim that survives dismissal of a Title IX claim, but not the converse.[7]

The second reason that equal-protection claims are more difficult to prove is that Title IX claimants do not have to prove that the school district maintained a custom, policy, or practice of gender discrimination. Under Title IX, liability is permissible if a single school administrator with authority to take corrective action responded with deliberate indifference. *Gebser v. Lago Vista Indep.*

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[7] *See, e.g., Williams,* 477 F.3d 1282 (allowing Title IX claim to proceed but affirming dismissal of equal protection claim); *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238 (10th Cir. 1999) (same); *Doe v. Sch. Admin. Dist. No. 19*, 66 F.Supp.2d 57, 65 (D. Me. 1999) (allowing Title IX claim to proceed but dismissing equal protection claim).

Sch. Dist., 524 U.S. 274, 291 (1998). Thus, the student may prevail merely by showing the mishandling of her own situation. In contrast, to hold a school district liable under Section 1983, plaintiffs must demonstrate that a municipal policy or custom inflicted her constitutional injury. *See Monell v. Department of Soc. Services of N.Y.*, 436 U.S. 658, 694 (1978) (holding that local governments are "persons" that may be sued under Section 1983).[8] More specifically, the plaintiff must show that the entity's custom or policy reflected a "deliberate" choice and was the moving force behind the deprivation of federal rights. *Bd. of Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403-04, 407 (1997) (citation omitted).

Although both Title IX and Section 1983 share a "deliberate indifference" requirement,[9] the

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[8] The *Monell* case, which was decided in 1978, further undermines Petitioners' claim that Section 1983 discrimination claims were "preexisting" at the time of Title IX's enactment. In 1972, prior to *Monell*, the Court had not yet ruled that school districts could be sued for damages under Section 1983. The Court in *Cannon* recognized this limitation, noting that Section 1983 was "assuredly not available" in suits against the federal government, the states, "nor even perhaps" local school districts. *Cannon v. Univ. of Chicago*, 441 U.S. 667, 701 n. 27 (1979); *see also Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 279 (1977) (declining to rule "whether a school district is a person" for purposes of Section 1983).

[9] The Court first applied the "deliberate indifference" standard in a Title IX case in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998). In *Gebser*, the Court held that the school district could not be held liable unless the school district knew about and was "deliberately indifferent" to teacher's harassment of the student. *Id.* at 291-292. In setting forth this requirement, the Court cited two Section 1983 cases,

deliberate indifference requirement under Section 1983 is *in addition to* the elements necessary to establish the underlying constitutional violation, including any state of mind requirements that might apply to the underlying constitutional provision. *Brown*, 520 U.S. at 405, 407. In short, Section 1983 claims differ in two important respects from Title IX claims: the intent burden is different, and plaintiffs must prove that a custom or policy caused her injury. *See, e.g., Rost v. Steamboat Springs RE-2 Sch. Dist.,* 511 F.3d 1114, 1124-25 (10th Cir. 2008) (holding that district could not be held liable for equal protection violation under Section 1983 because there was no evidence in support of the *Monell* requirements); *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716 (6th Cir. 1996) (same); *Brittany B. v. Martinez*, 494 F.Supp.2d 534, 541-42 (W.D. Tex. 2007) (rejecting equal protection claim against school board because of student's failure to establish

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Board of Commissioners of Bryan County v. Brown, 520 U.S. 397 (1997), and *City of Canton v. Harris*, 489 U.S. 378 (1989), as embodying the proper framework for evaluating claims under Title IX. *Gebser*, 524 U.S. at 291. Subsequently, the lower courts have treated the deliberate indifference standard under the two statutes as virtually the same. *See, e.g., Porto v. Town of Tewksbury,* 488 F.3d 67 (1st Cir. 2007) (relying on Section 1983 cases to explain "deliberate indifference" under Title IX); *Simpson v. Univ. of Colorado at Boulder*, 500 F.3d 1170, 1178 (10th Cir. 2007) (same). "Deliberate indifference" is a "stringent standard of fault" and requires proof of more than just "heightened negligence." *Brown*, 520 U.S. at 407, 410. As noted by the Respondents, because the deliberate indifference analysis under Section 1983 and Title IX is virtually the same, and because the deliberate indifference element has already been decided against Petitioners, they should not be permitted to proceed with their Section 1983 claim.

Section 1983 elements). Not only are *Monell's* requirements harder to prove, the requirements of *Monell* generally lead to more burdensome and costly discovery than what is typically seen in a Title IX case, as plaintiffs are compelled to seek discovery on past incidents at schools throughout the district.[10]

Another reason that Section 1983 cases are more costly and burdensome is that Section 1983 cases usually involve multiple defendants, such as principals, superintendents, deans, and counselors. Multi-party cases are by nature more expensive because they tend to involve more issues and more lawyers. In a Section 1983 case, these costs are

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[10] *Monell* claims "allow a broad inquiry into police practices and procedures, citizen complaints, similar incidents, and internal disciplinary actions 'extending well beyond the immediate circumstances surrounding plaintiffs' arrests.'" *Vodak v. City of Chicago*, 2004 WL 1381043 (N.D. Ill. 2004), citing *Langford v. City of Elkhart*, 1992 WL 404443 (N.D. Ind. April 21, 1992) (unpublished). *See, e.g., Doe v. District of Columbia*, 230 F.R.D. 47 (D.D.C. 2005) (in Section 1983 suit based on child abuse which allegedly occurred in private foster care group homes, child was entitled to seek testimony regarding complaints of abuse pertaining to any children placed in foster care facilities; such evidence was "crucial" to establishing a policy or practice under Section 1983); *Seales v. Macomb County*, 226 F.R.D. 572, 578-79 (E.D. Mich. 2005) (in Section 1983 suit based on assault of juvenile in a county facility, plaintiff was entitled to copies of all complaints filed against staff members during a five-year period); *Martinez v. Cornell Corrections of Texas*, 229 F.R.D. 215 (D.N.M. 2005) (female detainee who allegedly was raped was permitted to discover other post-incident assaults); *Cadiz v. Kruger*, 2007 WL 4293976 (N.D. Ill. 2007) (acknowledging that a *Monell* claim involves "broad" discovery and that "the presence of a *Monell* claim typically will expand the scope and thus the cost of discovery").

further increased because school officials who are sued individually almost always assert qualified immunity, a defense that shields school administrators from suit unless they personally participated in, or were deliberately indifferent to, a violation of the student's clearly established constitutional rights.[11]

This Court has repeatedly recognized the important role of immunity in protecting public officials from the disruption and costs associated with litigation. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Because lawsuits against individual administrators directly challenge professional reputations and may threaten livelihoods, immunity is routinely asserted via pretrial motions to dismiss and motions for summary judgment. The immunity defense is so important that this Court has authorized public officials to file more than one interlocutory appeal of lower court rulings denying immunity. *See Behrens v. Pelletier*, 516 U.S. 299 (1996). The consequences of an administrator's assertion of this important defense include satellite litigation and interlocutory appeals over immunity, increased cost for all parties, and delayed resolution of the student's case.[12] Further, at the end of the

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[11] *See generally Williams v. Board of Regents*, 477 F.3d 1282, 1300 (11th Cir. 2007); *Cox v. Sugg*, 484 F.3d 1062, 1066 (8th Cir. 2007); *Dale v. White County, Georgia Sch. Dist.*, 238 Fed. Appx. 481, 2007 WL 1828943 (11th Cir. 2007).

[12] The subject of qualified immunity remains the subject of considerable debate and litigation. *See, e.g., Pearson v. Callahan*, No. 07-751, 128 S.Ct. 1702 (2008) (directing the parties to brief whether the qualified immunity test from *Saucier v. Katz*, 533 U.S. 194 (2001), should be overruled).

day, notwithstanding these delays and costs, granting of immunity is more likely than not because it is difficult for students to prove discriminatory intent and deliberate indifference even when the facts indicate violent acts of harassment.[13]

In juxtaposition to these significant burdens and costs, plaintiffs actually would gain little by the addition of a Section 1983 claim when the underlying facts are virtually identical to those alleged under Title IX. If the student is not successful on her Title IX claim, then constitutional liability also is unlikely, given Section 1983's rigorous elements and the higher standard that applies in equal protection cases. *See, e.g., Rost*, 511 F.3d at 1124-1125; *Soper*, 195 F.3d at 852. Conversely, if the plaintiff can satisfy Title IX's elements, then the plaintiff will obtain damages and attorneys' fees without ever having to establish the additional elements associated with constitutional claims brought under Section 1983. There is no significant advantage or benefit for a student to assert a Section 1983 claim based on the same facts as the student's Title IX claim. Title IX provides a meaningful and comprehensive remedy in a wide

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[13] *See, e.g., Williams,* 477 F.3d at 1301 (allowing Title IX claim to proceed against university but affirming dismissal of equal protection claim against university officials); *Cox*, 484 F.3d at 1067-68 (rejecting equal protection claims against university administrators because no deliberate indifference); *Henderson v. Walled Lake Consolidated Schs.*, 469 F.3d 479, 492 (6th Cir. 2006) (rejecting claim because no proof of dissimilar treatment or deliberate indifference); *Soper v. Hoben*, 195 F.3d 845, 852-54 (6th Cir. 1999) (rejecting claim because no evidence of disparate treatment by school officials).

range of cases involving discrimination and harassment.[14] When a student sues school officials—not for direct acts of harassment—but for maintaining a discriminatory policy, Title IX "furnishes all the relief that is necessary to rectify the discriminatory policies or practices of the school itself." *Delgado v. Stegall*, 367 F.3d 668, 674 (7th Cir. 2004).

II. Petitioners' argument, if accepted, will disrupt long-standing principles limiting governmental liability for private acts of discrimination and will have detrimental consequences for schools, universities, and other governmental entities.

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[14] *See, e.g., Simpson v. University of Colorado at Boulder*, 500 F.3d 1170 (10th Cir. 2007) (allowing Title IX claim to proceed because there was a factual dispute whether the university's coach was deliberately indifferent when he engaged in recruiting practices that led to rape of female students by male athletes); *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253 (6th Cir. 2006) (affirming verdict in favor of plaintiff who was assaulted by classmate); *Schroeder v. Maumee Bd. of Educ.*, 296 F.Supp. 869, 880 (D.Ohio 2003) (holding that student perceived as gay stated a claim under Title IX based on district's alleged unequal enforcement of name-calling rules); *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994) (student who alleged that the college imposed stiffer penalty for male-to-female sexual harassment than it did for male-on-male physical assault stated a claim under Title IX); *see also Seamons v. Snow*, 84 F.3d 1226, 1233 (10th Cir. 1996) (rejecting male athlete student's hostile environment claim because of the failure to show sex discrimination but suggesting that the student would have stated a claim if he had shown that school officials "would have acted differently if a similar event had occurred in the women's athletic program").

The Petitioners suggest that, by setting aside the First Circuit's ruling, the Court will give students the opportunity to remedy a vast range of currently "unremedied" constitutional violations. This argument is breathtaking in its sweep because it *presumes* that the "unremedied" incidents actually are *constitutional* in nature. The Petitioners appear to lose sight of the fact that the "unremedied" incidents in this case are the offensive provocations of a third-grade student, not the school district or its administrators. Section 1983 provides a cause of action only for unconstitutional action taken "under color of state law." *Mitchum v. Foster*, 407 U.S. 225, 241 (1972); *Adickes v. Kress & Co.*, 398 U.S. 144, 149 (1970). The state-action requirement of Section 1983 and the Equal Protection Clause cannot be met without doing serious damage to this element. The Court has repeatedly expressed its "reluctance to treat the Fourteenth Amendment as a 'font of tort law.'" *Town of Castle Rock v. Gonzalez*, 545 U.S. 748, 768 (2005) (citations omitted). It has recognized that not every injury in which a state official "has played some part" is actionable under Section 1983. *Martinez v. California*, 444 U.S. 277, 285 (1980) (rejecting Section 1983 claim against parole board members based on parolee's murder of a girl after his early release from prison).

Petitioners' theory, if accepted, will disrupt long-standing principles limiting governmental liability for private acts of discrimination. Eliminating or diluting the state action requirement will seriously impact schools, universities, social services, and law enforcement by exposing them to unprecedented constitutional liability for failing to

control the acts of private third parties. The implications for schools and other local governments are enormous.

The "language and purpose" of the Fourteenth Amendment place "certain limitations" on the manner in which Congress may attack discriminatory conduct. *Morrison*, 529 U.S. at 620. "These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government." *Id.* "Foremost" among these limitations is the "time-honored principle" that the Fourteenth Amendment prohibits only state action. *Id.* at 621; *see also Castle Rock,* 545 U.S. 748 (mother of children murdered by their father could not sue police officers under Section 1983; the Fourteenth Amendment "did not create a system by which police departments are generally held financially accountable for crimes that better policing may have prevented"). Private conduct, however discriminatory or wrongful, is not actionable under the Fourteenth Amendment, even if the state is aware of the discrimination. *See Moose Lodge No. 127 v. Irvis*, 407 U.S. 163, 172 (1972).

The Court has recognized that discriminatory acts by private actors will not give rise to civil-rights liability even when the public entity is charged with regulating the conduct of the private actor:

> The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private

> entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in The Civil Rights Cases, supra, and adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' *Reitman v. Mulkey*, 387 U.S. 369, 380, 87 S.Ct. 1627, 1634, 18 L.Ed.2d 830 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition.

Moose Lodge No. 127, 407 U.S. at 176-77. The Court's recognition that the state may not be held liable for private acts of discrimination caused by private persons in connection with "state-furnished services" has special resonance in education, which is the predominant "state-furnished service" in nearly every community in the United States. More than 47 million children attend the nation's public schools *on a daily basis,* while more than 13 million students attend the nation's public colleges and

universities.[15] The number of potential claimants is staggering. In the typical elementary school classroom, children often outnumber adults by 20 to 1, and the ratio is often higher on school buses and during extracurricular activities. The ratios are even higher in secondary schools and in higher education settings.

Section 1983 claims based on the state's failure to protect citizens from other citizens arise in many other contexts, too, including the police and social services contexts. *See*, *e.g.*, *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (rejecting claim against police based on failure to enforce restraining order against abusive spouse); *DeShaney v. Winnebago County Dep't of Soc. Services*, 489 U.S. 189 (1989) (rejecting claim against social workers who failed to protect child from abusive father); *Martinez v. California*, 444 U.S. 277 (1980) (rejecting claim against state officials who authorized parole for a man who subsequently murdered plaintiff's daughter). In 1980, 1989, and again in 2005, the Court rejected these claims under the Due Process Clause, each time expressing an unwillingness to expand constitutional liability to encompass the misconduct of private third parties.

Like the case before the Court, these other third-party cases involved terrible and occasionally horrific acts inflicted upon innocent persons. In

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[15] *See* National Center for Education Statistics, Digest of Education Statistics: 2007, *available at* http://www.nces.ed.gov/programs/digest/d07/tables/dt07_002.asp.

DeShaney, for example, a state social worker negligently placed a boy with his abusive father, who battered the child nearly to the point of death. In holding that private violence did not violate due process, the Court observed:

> Judges and lawyers, like other human beings, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation. But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the State ... but by Joshua's father.

489 U.S. at 202-03. Inaction by the state, even in the face of a known danger, is not enough to trigger a constitutional duty to protect unless the state has a custodial or other special relationship with the victim. *See Seamons v. Snow,* 84 F.3d 1226, 1236 (10th Cir. 1996) (citation omitted).[16]

In *DeShaney*, the Court recognized in a footnote that a state may not, "of course, selectively deny its protective services to certain disfavored

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[16] "Persons do not become state actors because they are clients of government services, whether they are students, hospital patients, or prison inmates." *Yeo v. Town of Lexington*, 131 F.3d 241 (1st Cir. 1997). The lower courts agree that compulsory attendance laws do not create an affirmative constitutional duty to protect students. *See Lee v. Pine Bluff Sch. Dist.*, 472 F.3d 1026 (8th Cir. 2007); *Soper v. Hoben*, 195 F.3d 845 (6th Cir. 1999); *Walton v. Alexander*, 44 F.3d 1297 (5th Cir. 1995); *D.R. by L.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364 (3d Cir. 1992).

minorities without violating the Equal Protection Clause." 489 U.S. at 197 n. 3. Much post-*DeShaney* litigation has centered on this footnote. The lower courts have warned litigants against using the footnote as an "end run" around the *DeShaney* principle "that there is no constitutional right to state protection for acts carried out by a private actor." *See Beltran v. City of El Paso*, 367 F.3d 299, 304 (5th Cir. 2004). To prevent end runs, lower courts have vigilantly enforced the respective requirements of both the Equal Protection Clause and Section 1983 by requiring proof of a custom or policy of invidious discrimination. *See id.* at 306 (rejecting plaintiff's equal protection claim that a city's 911 dispatcher policy improperly subjected "family violence assault" calls to a lower priority than other types of calls and explaining that the requirements of *Monell* are "crucial" to ensure that law enforcement officials are not held to account for injuries that "are solely attributable to the perpetrators of the underlying domestic assault"); *see also Burella v. City of Philadelphia*, 501 F.3d 134 (3d Cir. 2007) (wife who was shot by husband failed to establish equal protection violation against police officers and city who failed to enforce restraining orders); *Mody v. City of Hoboken*, 959 F.2d 461 (3d Cir. 1992) (rejecting claim brought by family of murdered son because there was no evidence of a constitutionally discriminatory policy to provide Asian Indians with less protection from crime); *Soto v. Flores*, 103 F.3d 1056 (1st Cir. 1997) (holding that there was insufficient evidence that discrimination against women was motivating factor behind police department's alleged policy or custom of providing

less protection to women victims of domestic violence).

This lawsuit is a textbook example of an end run around *DeShaney*. In the case before the Court, after being notified of the parents' complaints, the school officials responded with an immediate investigation, interviewing dozens of children who rode the bus, questioning the alleged offender, and interviewing the bus driver. *Fitzgerald*, 504 F.3d at 173. Follow-up interviews with select witnesses also were conducted, and the school offered various remedies designed to separate the child from the alleged offender. *Id.* No further incidents occurred on the bus, and any other "unsettling interactions" with the offending student were promptly addressed. *Id.* Although the district's actions might not have been "flawless," *id.* at 174, there is *no* indication on the record before the Court that the school district's response was deliberately indifferent to the student's situation or that the school district was motivated by an intent or purpose to discriminate against girls. Indeed, as noted in the Respondents' brief on the merits, Petitioners' complaint was the first and only student-to-student sexual harassment complaint that the principal or superintendent had ever received. (Respondents' Brief at 27.) Liability on these facts cannot be squared with the result in *DeShaney*.

Declining to provide a constitutional remedy for every act of wrongdoing that might occur at the schoolhouse does not mean that these harms are unimportant or unworthy of potential regulation. In particular, parents and students are free to sue

under state law the students who actually inflicted their injuries. Additionally, the states remain free to provide additional remedies for the few scenarios not presently covered by Title IX. *See Castle Rock,* 545 U.S. at 768-69 ("the people of Colorado are free to craft" remedies to hold police departments accountable for failing to provide better policing); *DeShaney*, 489 U.S. at 202 ("The people of the Wisconsin may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act in situations such as the present one ... But they should not have it thrust upon them by this Court's expansion" of the Fourteenth Amendment); *see also Davis*, 526 U.S. at 685 (Kennedy, J., dissenting) (concluding that federalism concerns counsel against federal remedies for peer harassment; defining the role of schools is best left to government more proximate to the people). It is appropriate to allow state legislatures, which control the formulas that determine school funding, to evaluate whether it is desirable to raise local taxes to accommodate the creation of new claims against schools based on student-to-student harassment.

Disregarding the unique limitations of Section 1983, the Petitioners argue that Section 1983 claims should be permitted in all gender discrimination cases, including third-party peer harassment cases, because, at the time of Title IX's adoption, some lower courts had allowed parallel Section 1983 and Title VI claims. They cite a number of lower court cases in which both Title VI and Section 1983 claims were asserted. None of the cited cases appear to have involved harassment by third parties. The

cases appear to involve direct acts of discrimination by the government actors, such as discriminatory promotion decisions. The cases do not support their contention that Congress reasonably understood Section 1983 as providing a preexisting remedy for the type of conduct alleged in this case.

III. The absence of an individual cause of action against non-harassing school administrators shows that Congress believed that suits against institutions were the best means for redressing this type of discrimination.

Petitioners object that the ruling below precludes their suing the school superintendent, an individual who, it is undisputed, never personally or directly harassed their child. They claim that there "may" be good reasons for suing an administrator but not the school district, although they never really articulate what these good reasons are, other than suggesting that the remedy is needed for deterrence purposes. Their argument fails for a number of reasons.

First and foremost, in *Gebser*, the Court expressly recognized that Title IX does not preclude Section 1983 actions against individual school employees who personally engage in acts of sexual harassment. The lower courts have amplified this point, observing that nothing in Title IX's history or text indicates that Congress intended to prevent claims against "teachers or other non-managerial employee[s]" who harass students. *Delgado v. Stegall*, 367 F.3d 668, 675 (7th Cir. 2004). Although

Title IX furnishes all the relief that is necessary to rectify the school district's discriminatory practices when the claim is based on the district's deficient policies or practices, that scenario differs from cases "in which the malefactor is a teacher whose malefaction is not a policy or a practice for which the school could be held liable under Title IX." *Id.* at 674. Nothing in the ruling below jeopardizes a cause of action based on a school employee's harassing acts.

Second, as previously discussed, in cases in which an administrator is sued not for his own acts of harassment but for failing to prevent students from being harmed by others, the administrator ordinarily will be immune from these claims unless there is evidence that he or she was motivated by discriminatory animus and responded with deliberate indifference. *See, e.g.*, *Williams*, 477 F.3d at 1301; *Soper*, 195 F.3d at 852-854. In those rare instances when the plaintiff can negate the qualified immunity defense, the Section 1983 claim is still superfluous because Title IX already provides a remedy for the same deliberately indifferent conduct. The court below correctly concluded that a remedial scheme can be considered comprehensive even if it does not afford a private right of action against every potential wrongdoer. *Fitzgerald*, 504 F.3d at 178; *see also Boulahanis v. Bd. of Regents*, 198 F.3d 633, 640 (7th Cir. 1999) (the absence of a cause of action against non-harassing school administrators indicates Congress's informed judgment that suits against the institution are the best means of redressing discrimination in the schools).

Third, Petitioners' deterrence argument lies on a shaky foundation that ultimately rests on an overly simplistic view of child development and human behavior. A few more lawsuits, they say, and students will be safer. Although the risk of Section 1983 liability might deter a police officer from engaging in a high-speed chase or using a firearm, the heart of a peer harassment case is misconduct *by students*—students on school buses, in dorm rooms, on field trips, on practice fields, and in countless other settings where students assemble together. In *Davis,* the Court observed that "children are still learning how to interact appropriately with their peers" and often engage in offensive conduct that harms other children. 526 U.S. at 651; *see also Davis*, 526 U.S. at 643 (noting the "inevitability of student misconduct"). The world of children has not changed in the 10 years since *Davis,* and the challenge of investigating student complaints and meting out punishment remains as complex as ever.[17] Similar challenges confront higher education administrators who often are called upon to investigate sexual misconduct incidents stemming from the misuse of drugs or alcohol[18] and incidents occurring in dormitories.[19] Expanding opportunities

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[17] *See, e.g., Rost v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114 (10th Cir. 2008) (noting the complexity of a student disciplinary situation involving "conflicting facts"; sorting through the dispute "would be daunting").

[18] *Mallory v. Ohio Univ.*, 76 Fed. Appx. 634 (6th Cir., Sept. 11, 2003) (college student challenged expulsion for sexual assault claiming that the conduct with intoxicated female was consensual).

[19] *Williams*, 477 F.3d at 1288 (female student allegedly was gang-raped in dormitory by male athletes). Dormitory life

for constitutional litigation will neither change the students nor improve the ability of a school administrator to ferret out the false allegations from the true ones.

In nearly every discipline situation, there are two competing sets of potential litigants: the alleged victim who complains that the school did not do enough and the alleged offender who claims that the punishment was unfair. *See, e.g., Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (student argued that the school had no right to discipline him for using sexual vulgarities); *Wayne v. Shadowen*, 15 Fed. Appx. 271, 2001 WL 873747 (6th Cir. 2001) (middle school student challenged discipline imposed for his aggressively profane conduct); *see also Fitzgerald*, 504 F.3d at 174 (in peer harassment cases, "a public school has obligations not only to the accuser but also to the accused"). The Court must avoid shrinking the already narrow path school officials must tread between competing litigants when they are deciding whether and when to discipline.

Petitioners' argument presumes, without empirical support, that administrators will ignore harassment unless they are subject to personal liability under Section 1983. In fact, school officials have no incentive to tolerate discrimination or misconduct in the schools. From the special

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represents a specially difficult supervision challenge for college officials. *See generally Davis*, 526 U.S. at 682 (Kennedy, J., dissenting) (expressing concern about the regulation of student behavior in dormitories, "the most private of domains").

education teacher who has devoted her adult life to working with autistic children to the counselor who reaches out to at-risk students, our nation's educators work hard, for modest pay, to create opportunity for children. Student misconduct is not professionally, economically, or emotionally rewarding for any administrator or teacher, many of whom are parents themselves. It does not raise test scores or pass bond elections.

The federal courts' historical reluctance to interfere with school discipline is grounded in the recognition that school officials have the expertise to respond to discipline problems and that they, by and large, will exercise good faith professional judgment and pursue pedagogically sound methods when dealing with difficult and immature students.[20] Children have limited life experiences upon which to establish an understanding of appropriate behavior, while others have unstable family influences.[21] Further, exposure to mass media and the Internet has had a profound cultural impact on our nation's youth, exposing them to content unknown to previous generations. The occurrence of harassment in the schools (and student misconduct in general)

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[20] *See Davis v. Monroe County Bd. of Educ.,* 526 U.S. 629, 648 (1999); *Bd. of Educ. v. McCluskey*, 458 U.S. 966, 969-70 (1982); *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985).

[21] *See, e.g., Wayne v. Shadowen*, 15 Fed. Appx. 271, 2001 WL 873747 at 276 (6th Cir. 2001) (rejecting claim by middle school student who challenged discipline for obscene behavior and chastising student's "indulgent" parent for refusing to impose "any effective affirmative parental sanctions designed to reinforce the school administration's discipline").

reflects our larger society and is not an indicator of callousness by educators.

Court rulings that subject educators to litigation and personal liability, even for erroneous decisions rendered in good faith, complicate the challenge that school boards face in recruiting and retaining qualified personnel.[22] In one 2003 survey, 55 percent of principals reported that they were either very or somewhat concerned about the risk of lawsuits.[23] Further, about nine in ten educators reported that the imperative to avoid legal challenges leads to unnecessary paperwork, which increases cost and time spent away from other more productive tasks.[24] Litigation against an administrator or the district for which he or she works can make finding a new job difficult, regardless of the outcome of the litigation.[25]

The demands on school administrators are great. These educators manage budgets, curriculum, teacher employment, school construction, transportation, special education, high-stakes testing, athletics, and ever shifting parental

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[22] *See generally* D. Stover, "Looking for Leaders, Urban Districts Find that the Pool of Qualified Superintendents is Shrinking," American Sch. Bd. J. (Dec. 2002); P. Cusik, "The Principleship? No Thanks. Why teachers won't trade the classroom for the office," EDUC. WEEK (May 14, 2003).

[23] *See* Harris Interactive, *Evaluating Attitudes Toward the Threat of Legal Challenges in Public Schools* (March 2004).

[24] *Id.*

[25] *See* P. Westmoore, "Lew-Port Candidate Explains Lawsuits Against Him," BUFFALO NEWS, June 18, 2008, at B6.

demands. In times of natural disaster, as with Hurricane Katrina, they are handed the task of rebuilding the schools from scratch. They shoulder these responsibilities at salaries that are a fraction of the salaries of corporate executives, and turnover among administrators remains high. These concerns reinforce the importance of affording school personnel some measure of protection against personal liability. Given that Title IX already provides an appropriate remedy against districts that are deliberately indifferent to incidents of student harassment, Petitioners' justification for wanting to sue the superintendent rings especially hollow.

IV. Schools and state legislatures have responded to the challenge of student misbehavior through the adoption of policies and regulations requiring disciplinary procedures and training programs for students and staff.

Schools have not turned a blind eye to the problem of student harassment. The education community has responded with an array of policies, training materials, and educational programs that simply did not exist 15 years ago.[26] During the last

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[26] *See, e.g.*, Texas Association of School Boards, BULLYING AND HARASSMENT IN SCHOOLS (DVD 2007); B. Sandler & H. Stonehill, STUDENT-TO-STUDENT SEXUAL HARASSMENT K-12: STRATEGIES AND SOLUTIONS FOR EDUCATORS TO USE IN THE CLASSROOM, SCHOOL AND COMMUNITY (Rowman & Littlefield Educ. Publishers 2005); S. Wessler & W. Preble, THE RESPECTFUL SCHOOL: HOW EDUCATORS AND STUDENTS CAN CONQUER HATE AND HARASSMENT (Alexandria, VA, Ass'n for

decade—the period since this Court's rulings in *Gebser* and *Davis*—the state legislatures also have stepped in, adopting new laws requiring programs to address harassment and bullying in ways unknown to prior generations of students.[27] These state and

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Supervision & Curriculum Development 2003); M. Bonds & S. Stoker, BULLY-PROOFING YOUR MIDDLE SCHOOL: A COMPREHENSIVE APPROACH FOR MIDDLE SCHOOLS (Colorado: Sopris West 2000); R.L. Curwin & A.N. Mendler, DISCIPLINE WITH DIGNITY (Alexandria, VA., Ass'n for Supervision & Curriculum Development 1999); D. Ross, CHILDHOOD BULLYING, TEASING, AND VIOLENCE: WHAT SCHOOL PERSONNEL, AND OTHER PROFESSIONALS AND PARENTS CAN DO (Alexandria, VA: American Counseling Ass'n, 2003, 2d ed.); R. Sabella & R. Myrick, CONFRONTING SEXUAL HARASSMENT: LEARNING ACTIVITIES FOR TEENS (Minneapolis, MN: Educational Media Corp., 1995).

[27] *See, e.g.*, M. McNeil, "South Carolina Training Aimed at Sex-Abuse Prevention: 10,000 school employees will learn to identify signs, respond in abuse cases," EDUC. WEEK (June 4, 2008); OKLA. STAT. tit. § 70-24-100.5(B) & 70-24-100.6 (2002) (requiring schools to use "safe school committees" and "problem-solving teams" that include counselors and/or school psychologists and giving victims of felony sexual offenses the right to avoid contact with their offenders while at school or on school buses); OR. REV. STAT. §§ 342.850, 842.865 (2007) (establishing a pilot program to provide parent training and counseling and social work services for students involved in serious offenses, including sexual harassment); R.I. GEN. LAWS § 16-21-26(j) (2006) (requiring schools to provide harassment training "to school employees and volunteers who have significant contact with pupils" and requiring programs "for discussing the harassment, intimidation or bullying policy with pupils"); TEXAS EDUC. CODE § 37.083 (Vernon 2006) (requiring school districts to implement policies and programs that "provide for prevention of and education concerning unwanted physical or verbal aggression, sexual harassment, and other forms of bullying in school, on school grounds, and in school vehicles"); W.VA. CODE §§ 18-2C-3, 18-2C-5 (2008) (requiring

local initiatives are, by and large, more specific than Title IX's implementing regulations, which merely require schools to adopt "grievance procedures" for the resolution of student complaints.[28]

Despite these efforts at the state and local level, schools will not be able to prevent all acts of harassment. There will be times in the future when young students are taunted by their peers or when college students are abused in their dorm rooms. As a society, we can do more to raise awareness and sensitivity. The solution, however, is not increased litigation. Rather than eliminate student misconduct, increased liability will divert money away from the very programs and efforts to help schools address this issue. When large verdicts are awarded in harassment cases against schools, everyone but a random plaintiff loses.

CONCLUSION

The writ should be dismissed or, in the alternative, the judgment of the First Circuit should be affirmed.

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that parents be notified of offenses, requiring certain educational programs and disciplinary procedures, and requiring that each district develop a policy through a process that includes representation of parents and students).

[28] 34 C.F.R. § 106.8(b).

Respectfully submitted,

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